

No.

In the Supreme Court of the United States

KENNETH GENALO, DIRECTOR OF THE
NEW YORK FIELD OFFICE OF U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

CAROL WILLIAMS BLACK

KENNETH GENALO, DIRECTOR OF THE
NEW YORK FIELD OFFICE OF U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT, ET AL., PETITIONERS

v.

KEISY G.M.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 8 U.S.C. 1226(c), certain criminal aliens are required to be detained pending a decision on whether they are to be removed from the United States. In *Jennings v. Rodriguez*, 583 U.S. 281 (2018), this Court held that Section 1226(c) prohibits the release of such aliens on bond. The Court reserved judgment on various constitutional issues on which it had ordered supplemental briefing, including whether the Due Process Clause requires bond hearings for certain Section 1226(c) detainees and, if so, what kind of bond hearing. Respondents here are two criminal aliens detained under Section 1226(c) for 7 and 21 months, respectively, pending their removal proceedings. The court of appeals held that each respondent's detention had become "unreasonably prolonged," such that due process entitled him to a bond hearing with the burden placed on the government to justify his continued detention by clear and convincing evidence. Pet. App. 5a. The questions presented are:

1. Whether there is a point at which an alien's detention under Section 1226(c), pending a decision on whether he is to be removed, becomes "unreasonably prolonged," such that due process requires a bond hearing.
2. If so, whether, in such a bond hearing, due process requires placing the burden on the government to justify the alien's continued detention by clear and convincing evidence.

PARTIES TO THE PROCEEDING

In *Black*, petitioners (appellants below) are Kenneth Genalo, in his official capacity as Director of the New York Field Office of U.S. Immigration and Customs Enforcement; Kristi Noem, in her official capacity as Secretary of the U.S. Department of Homeland Security; and Paul Arteta, in his official capacity as Sheriff of Orange County, New York.* Respondent (appellee below) is Carol Williams Black.

In *G.M.*, petitioners (appellees below) are Kenneth Genalo, in his official capacity as Director of the New York Field Office of U.S. Immigration and Customs Enforcement; Pamela J. Bondi, in her official capacity as United States Attorney General; Kristi Noem, in her official capacity as Secretary of the U.S. Department of Homeland Security; and Daren K. Margolin, in his official capacity as Director of the Executive Office for Immigration Review.* Respondent (appellant below) is Keisy G.M.

RELATED PROCEEDINGS

United States District Court (S.D.N.Y.):

Black v. Decker, No. 20-cv-3055 (July 24, 2020)

G.M. v. Decker, No. 21-cv-4440 (Nov. 29, 2021)

United States Court of Appeals (2d Cir.):

Black v. Almodovar, No. 20-3224 (Oct. 24, 2025)

G.M. v. Almodovar, No. 22-70 (Oct. 24, 2025)

* Director Genalo and Director Margolin are automatically substituted for their predecessors. See Sup. Ct. R. 35.3.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General—on behalf of Kenneth Genalo, the Director of the New York Field Office of U.S. Immigration and Customs Enforcement, and others—respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in these two cases. Pursuant to this Court’s Rule 12.4, the government is filing a “single petition for a writ of certiorari” because the “judgments

* * * sought to be reviewed” are from “the same court and involve identical or closely related questions.” Sup. Ct. R. 12.4.

OPINIONS BELOW

In both cases, the opinion of the court of appeals (Pet. App. 1a-48a) is reported at 103 F.4th 133. In *Black*, the opinion of the district court (Pet. App. 81a-104a) is available at 2020 WL 4230994. In *G.M.*, the opinion of the district court (Pet. App. 49a-80a) is available at 2021 WL 5567670.

JURISDICTION

In both cases, the judgment of the court of appeals was entered on May 31, 2024. A petition for rehearing was denied on October 24, 2025 (Pet. App. 105a-188a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part that no “person” shall “be deprived of life, liberty, or property, without due process of law.” U.S. Const. Amend. V.

The pertinent statutory provision, 8 U.S.C. 1226, is reproduced in the appendix to this petition. Pet. App. 290a-294a.

INTRODUCTION

In 8 U.S.C. 1226, Congress has provided for the detention of aliens pending their removal proceedings. For specified criminal aliens, Section 1226(c) “expressly prohibits [their] release” except on “narrow, witness-protection” grounds. *Jennings v. Rodriguez*, 583 U.S. 281, 304 (2018). Congress imposed that prohibition “out of concern that [bond] hearings could not be trusted to reveal which ‘deportable criminal aliens who are not de-

tained’ might ‘continue to engage in crime or fail to appear for their removal proceedings.’” *Nielsen v. Preap*, 586 U.S. 392, 412 (2019) (opinion of Alito, J.) (brackets omitted) (quoting *Demore v. Kim*, 538 U.S. 510, 513 (2003)).

A panel of the Second Circuit nevertheless held that certain Section 1226(c) detainees—those whose detention has become, in the panel’s view, “unreasonably prolonged”—have a due-process right to a bond hearing in which the government bears the burden of demonstrating by clear and convincing evidence that they are either a flight risk or a danger to the community. Pet. App. 5a; see *id.* at 15a-45a. As the dissents from the denial of rehearing en banc make clear, the panel’s decision is seriously misguided. See *id.* at 110a-129a (Nardini, J., dissenting from the denial of rehearing en banc); *id.* at 130a-150a (Menashi, J., dissenting from the denial of rehearing en banc). Section 1226(c) detainees have no *procedural*-due-process right to a bond hearing on matters that are “not material” to the “statutory scheme.” *Connecticut Dep’t of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003). And where, as here, detention bears a reasonable relation to legitimate immigration purposes—such as “preventing deportable criminal aliens from fleeing” or “continu[ing] to engage in crime” while their removal proceedings are pending, *Demore*, 538 U.S. at 513, 528—Section 1226(c) detainees have no *substantive*-due-process right to a bond hearing either.

This Court’s review is plainly warranted. The Court “usual[ly]” grants review when, as here, a lower court invalidates the application of a federal statute. *Iancu v. Brunetti*, 588 U.S. 388, 392 (2019). The constitutional questions presented are the subject of disagreement among the circuits. See Pet. App. 112a-113a, 123a-126a (Nardini, J., dissenting from the denial of rehearing en

banc); *id.* at 130a-131a (Menashi, J., dissenting from the denial of rehearing en banc). And in *Jennings*, this Court ordered supplemental briefing on those same issues, but ultimately did not resolve them. These cases present a clean vehicle for the Court to do so.

STATEMENT

A. Legal Background

The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, authorizes the removal of certain classes of aliens from the United States. 8 U.S.C. 1182, 1227. Various provisions of the INA also authorize the detention of aliens in connection with their removal. One of those provisions is 8 U.S.C. 1226.

Section 1226 authorizes the detention of certain aliens “pending a decision on whether the alien is to be removed from the United States.” 8 U.S.C. 1226(a). In general, the detention of those aliens is discretionary; Section 1226(a) provides that the Secretary of Homeland Security (Secretary) “may” release them on bond or conditional parole. *Ibid.*¹ That general rule, however, is subject to an exception set forth in Section 1226(c).

Congress enacted Section 1226(c) as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., § 303(a), 110 Stat. 3009-585 to 3009-586. The provision “sprang from a ‘concern that deportable criminal aliens who are not detained continue to engage in crime and fail to appear for their removal hearings in large num-

¹ Congress has transferred from the Attorney General to the Secretary the enforcement of the INA, but the Attorney General retains authority to administer certain removal proceedings and decide relevant questions of law. See *Nielsen v. Preap*, 586 U.S. 392, 397 n.2 (2019).

bers.’” *Nielsen v. Preap*, 586 U.S. 392, 398 (2019) (brackets and citation omitted). “To address this problem, Congress mandated that aliens who were thought to pose a heightened risk be arrested and detained without a chance to apply for release on bond or parole.” *Ibid.*

Section 1226(c) sets out five categories of “criminal aliens” subject to mandatory detention. IIRIRA § 303(a), 110 Stat. 3009-585 (capitalization altered). The first three categories consist of aliens inadmissible or deportable by reason of having committed a covered offense, such as a crime involving moral turpitude or an aggravated felony. 8 U.S.C. 1226(c)(1)(A)-(C). The fourth category encompasses aliens inadmissible or deportable on grounds relating to terrorist activity. 8 U.S.C. 1226(c)(1)(D). And the fifth category—recently added by the Laken Riley Act, Pub. L. No. 119-1, § 2(1)(C), 139 Stat. 3 (2025)—consists of aliens inadmissible on specified grounds who have been charged with, been arrested for, been convicted of, or admitted having committed certain offenses, including any crime resulting in death or serious bodily injury to another person. 8 U.S.C. 1226(c)(1)(E).

Section 1226(c) provides that the Secretary “shall take into custody any alien” who falls within one of those five categories. 8 U.S.C. 1226(c)(1). Section 1226(c) further provides that the Secretary “may release” such an alien “only” in one narrow circumstance: “if [the Secretary] decides” that release is “necessary to provide protection” for witnesses or persons cooperating with a criminal investigation (or their immediate family relatives or close associates). 8 U.S.C. 1226(c)(4).

In *Jennings v. Rodriguez*, 583 U.S. 281 (2018), this Court granted certiorari to decide, among other things, whether criminal aliens “who are subject to mandatory detention under Section 1226(c) must be afforded bond

hearings, with the possibility of release, if detention lasts six months.” Pet. at I, *Jennings, supra* (No. 15-1204). Although the Court in *Jennings* ordered supplemental briefing on whether “the Constitution requires” that a criminal alien be afforded such a bond hearing, 580 U.S. 1040 (2016), the Court ultimately did not resolve that constitutional issue, 583 U.S. at 312. Instead, the Court addressed only whether the statute itself entitles a criminal alien to such a bond hearing, and concluded that it does not. *Id.* at 303-306. The Court held that “§ 1226(c) mandates detention of any alien falling within its scope and that detention may end prior to the conclusion of removal proceedings ‘only if’ the alien is released for witness-protection purposes.” *Id.* at 305-306.

B. Factual And Procedural Background

The respondents in these cases are two criminal aliens who fall within the scope of Section 1226(c): Carol Black and Keisy G.M.

1. Black is a native and citizen of Jamaica who became a lawful permanent resident of the United States in 1983. Pet. App. 81a-82a. In 2000, he was convicted of first-degree sexual abuse under New York law for subjecting a minor, who was less than 11 years old, to sexual contact. *Id.* at 82a. Black was also convicted of endangering the welfare of a child, in violation of New York law. *Ibid.* For each of those offenses, Black was sentenced to five years of probation. *Ibid.* His criminal history also includes convictions for criminal contempt, violating sex-offender-registry requirements, and petit larceny. 20-3224 C.A. App. 154-155.

On December 4, 2019, the Department of Homeland Security (DHS) served Black with a notice to appear for removal proceedings under 8 U.S.C. 1229a. Pet. App. 83a. The notice to appear charged Black with being sub-

ject to removal on two grounds: (1) for having been convicted of an aggravated felony, and (2) for having been convicted of “a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.” 20-3224 C.A. App. 110; see 8 U.S.C. 1227(a)(2)(A)(iii) and (E)(i). An alien who is deportable by reason of having committed an aggravated felony is in one of the categories of criminal aliens covered by Section 1226(c). See 8 U.S.C. 1226(c)(1)(B). Accordingly, DHS took Black into custody on December 4, 2019, and detained him under that provision without a bond hearing. 20-3224 C.A. App. 154; Pet. App. 285a-289a.

An alien who denies that he falls within the scope of Section 1226(c) may challenge his mandatory detention at a so-called *Joseph* hearing before an immigration judge (IJ). See *Demore v. Kim*, 538 U.S. 510, 514 n.3 (2003); *Matter of Joseph*, 22 I. & N. Dec. 799 (B.I.A. 1999). Black requested a *Joseph* hearing, Pet. App. 289a, and in March 2020, an IJ upheld his mandatory detention, *id.* at 283a-284a; see *id.* at 278a. In a subsequent decision, the IJ explained that Black falls within the scope of Section 1226(c) because his conviction for first-degree sexual abuse is a conviction for an aggravated felony. *Id.* at 276a-282a.² Meanwhile, in Black’s removal proceedings, the IJ found him removable as charged but gave him an opportunity to apply for asylum or withholding of removal. *Id.* at 278a; 20-3224 C.A. App. 157-161.

² In November 2020, the Board of Immigration Appeals affirmed that Black is subject to mandatory detention in light of *Rodriguez v. Barr*, 975 F.3d 188, 189-190 (2d Cir. 2020) (per curiam), cert. denied, 141 S. Ct. 1705 (2021), which held that the New York offense of sexual abuse that Black committed is an aggravated felony. See 20-3224 Gov’t C.A. Br. 9.

In April 2020, while proceedings before the IJ were ongoing, Black filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in federal district court, alleging that the COVID-19 pandemic had rendered the conditions of his detention unconstitutional. 20-cv-3055 D. Ct. Doc. 1, at 19-20 (Apr. 16, 2020). Black later amended his petition to allege that his detention under Section 1226(c) had become unreasonably prolonged, in violation of the Fifth Amendment’s Due Process Clause. Pet. App. 257a-265a. Black argued that due process prohibited his continued detention unless the government showed, at a bond hearing, that he posed either a flight risk or a danger to the community. *Id.* at 275a.

In July 2020, the district court granted habeas relief on Black’s prolonged-detention claim. Pet. App. 81a-104a. Noting that Black had been detained for “over seven months” under Section 1226(c), *id.* at 100a; see *id.* at 91a-92a, the court held that his “continued detention without an individualized bond hearing violate[d] his due process rights,” and it ordered the government to provide Black with a bond hearing before an IJ, at which the government would bear the burden of establishing “by clear and convincing evidence that [he] poses a risk of flight or a danger to the community,” *id.* at 102a.

An IJ conducted the court-ordered bond hearing and granted Black release on bond. Pet. App. 7a. After posting bond, Black was released from DHS custody on August 4, 2020. 20-3225 C.A. App. 183. The government appealed the district court’s grant of habeas relief to the Second Circuit.

2. G.M. is a native and citizen of the Dominican Republic who became a lawful permanent resident of the United States in 2011. Pet. App. 49a, 52a. In 2015, he was convicted of second-degree assault, in violation of

New York law, and sentenced to two years of imprisonment. *Id.* at 53a.

On October 5, 2020, DHS served G.M. with a notice to appear for removal proceedings under Section 1229a, charging him with being subject to removal for having been convicted of an aggravated felony. 22-70 C.A. App. 169-170; see 8 U.S.C. 1227(a)(2)(A)(iii). DHS took G.M. into custody on that same date and determined that his conviction rendered him subject to mandatory detention under Section 1226(c). Pet. App. 228a, 231a. G.M. did not request a *Joseph* hearing to challenge that determination. See *id.* at 54a n.7, 231a.

In December 2020, an IJ found G.M. removable as charged. Pet. App. 55a. The following March, a different IJ denied G.M.'s application for deferral of removal under the Convention Against Torture and ordered his removal to the Dominican Republic. *Id.* at 56a. G.M. appealed that order to the Board of Immigration Appeals (Board). *Id.* at 57a.

In May 2021, while that appeal was pending, G.M. sought habeas relief in federal district court. 22-70 C.A. App. 7-20. His amended petition, which he filed in June 2021, alleged that his detention under Section 1226(c) had become unreasonably prolonged, in violation of his procedural- and substantive-due-process rights. Pet. App. 212a-222a. G.M. argued that he was entitled to a bond hearing at which the burden would be on the government to justify his continued detention by clear and convincing evidence. *Id.* at 225a.

In November 2021, the district court denied G.M.'s habeas petition. Pet. App. 49a-80a. The court noted that G.M. had "been detained for nearly fourteen months." *Id.* at 66a. But the court found "no unreasonable delay by the Government in completing [his] deportation pro-

ceeding” and no “reason to think that his continued detention is for any purpose other than to facilitate his deportation.” *Id.* at 79a. The court therefore held that G.M.’s continued detention under Section 1226(c) did not violate his due-process rights. *Id.* at 65a-79a.

G.M. appealed to the Second Circuit. On July 7, 2022, while that appeal was pending, DHS released G.M. from custody pursuant to a nationwide injunction in *Fraihat v. U.S. Immigration & Customs Enforcement*, 445 F. Supp. 3d 709 (C.D. Cal. 2020), which required the release of certain detainees with COVID-19 risk factors. See 22-70 Supp. C.A. App. 4-9; *Fraihat v. U.S. Immigration & Customs Enforcement*, 16 F.4th 613, 632-634 (9th Cir. 2021). After G.M. was released, the Ninth Circuit issued its mandate reversing the injunction. See 20-55634 C.A. Doc. 93 (July 14, 2022); *Fraihat*, 16 F.4th at 651. The parties agreed that because DHS could “redetain [G.M.] in the future,” G.M.’s appeal of the district court’s habeas denial was “not moot.” 22-70 Resp. C.A. Reply Br. 1 n.1; see 22-70 Gov’t C.A. Br. 13 n.4.

3. The Second Circuit agreed to hear G.M.’s appeal in tandem with the government’s appeal in *Black*. 22-70 C.A. Doc. 154 (Nov. 1, 2022). After one member of the panel that heard argument passed away, Pet. App. 2a n.†, the two remaining judges affirmed in *Black* and reversed in *G.M.*, *id.* at 1a-48a.³

³ As a threshold matter, the court of appeals held that because *Black* and G.M. “each remain[] subject to possible detention,” neither appeal was “moot.” Pet. App. 3a. The court had previously denied *Black*’s motion to dismiss the government’s appeal on mootness grounds, which the government had opposed. 20-3224 C.A. Doc. 109 (Nov. 17, 2021); see 20-3224 C.A. Doc. 37, at 1, 5 (Mar. 22, 2021) (explaining that the government has an “interest” in “re-detaining *Black*” and “challenging the district court order that led to [his] release”). And the court agreed with G.M. and the government that “G.M.’s ap-

a. The court of appeals held that Section 1226(c) is unconstitutional as applied to aliens whose detention has become “unreasonably prolonged.” Pet. App. 5a. The court stated that when an alien’s detention reaches that point, the Due Process Clause requires that the alien be afforded a bond hearing to determine whether he poses a flight risk or a danger to the community. *Id.* at 15a-20a. In the court’s view, *Mathews v. Eldridge*, 424 U.S. 319 (1976), “supplies the proper framework for determining when” an alien is entitled to a bond hearing. Pet. App. 5a; see *id.* at 20a-31a. The court explained that *Mathews* requires a balancing of three factors:

(1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

Id. at 23a-24a (quoting *Mathews*, 424 U.S. at 335).

Applying those factors here, the court of appeals concluded that respondents’ detention under Section 1226(c)—for 7 months in Black’s case, and for 21 months in G.M.’s—had become “unreasonably prolonged,” such that both respondents were entitled to bond hearings. Pet. App. 39a; see *id.* at 4a. In the court’s view, all three *Mathews* factors supported that conclusion. *Id.* at 31a-39a. With respect to the first factor, the court characterized respondents’ interest as “the most significant liberty interest there is—the interest in being free from

peal seeking a bond hearing continues to present a live controversy” because the government could seek to re-detain him. Pet. App. 4a n.1.

imprisonment.” *Id.* at 31a (citation omitted). With respect to the second *Mathews* factor, it concluded that “almost *any* additional procedural safeguards at some point in the detention would add value,” and it described “an individualized bond hearing at which an IJ can consider the noncitizen’s dangerousness and risk of flight” as “[t]he most obvious” safeguard. *Id.* at 35a-36a. Finally, with respect to the third *Mathews* factor, the court expressed the view that “additional procedural safeguards” would “do nothing to undercut” the government’s interests in “ensuring the noncitizen’s appearance at proceedings” and “protecting the community from non-citizens who have been involved in crimes” because the IJ at “any ordered bond hearing” would “assess on an individualized basis whether the noncitizen presents a flight risk or a danger.” *Id.* at 36a.

b. The court of appeals further held that, in bond hearings for Section 1226(c) detainees, due process requires placing the burden on the government to justify the alien’s continued detention by clear and convincing evidence. Pet. App. 39a-45a. The court regarded its “analysis above of the first and third [*Mathews*] factors” as applying “with equal force” to its conclusion that the government must bear the burden of proof by a heightened standard. *Id.* at 40a. And in “elaborat[ing]” on “the second *Mathews* factor,” *ibid.*, the court stated that requiring detainees to “prove that they are *not* a danger and *not* a flight risk” would “present[] too great a risk of an erroneous deprivation of liberty after a detention that has already been unreasonably prolonged,” *id.* at 42a-43a.

4. The government petitioned for rehearing en banc, which was denied by the court of appeals. Pet. App. 105a-188a. Judge Nardini, joined by Chief Judge Living-

ston and Judges Sullivan, Park, and Menashi, dissented from the denial of rehearing, expressing the view that the panel had erred in requiring the government to justify a Section 1226(c) detainee’s continued detention by clear and convincing evidence, *id.* at 111a-112a; that the circuits have “diverge[d] widely” in addressing similar burden-allocation and standard-of-proof issues, *id.* at 112a; and that “only [this] Court can clean up this inter-circuit incoherence,” *id.* at 113a. Judge Menashi also filed a dissenting opinion, joined by Chief Judge Livingston and Judges Sullivan and Park, expressing the view that the panel had “provided no persuasive justification for invalidating the congressional policy reflected in § 1226(c),” *id.* at 130a; and that its decision “entrenches a direct circuit split with the Eighth Circuit,” *id.* at 149a.

5. The removal proceedings against Black and G.M. are still pending. Because they have not been in DHS custody since 2020 and 2022, their proceedings have not been prioritized by the immigration courts.⁴

In June 2023, the IJ denied Black’s application for asylum and withholding of removal, and ordered his removal to Jamaica. Pet. App. 7a. Black’s appeal of that order remains pending before the Board. *Ibid.*

In G.M.’s case, the Board issued a decision in December 2021 upholding G.M.’s removability but remanding for further consideration of his application for deferral of removal under the Convention Against Torture. 22-70 C.A. Doc. 33-3, at 3-5 (Apr. 25, 2022). In June 2022, the IJ again denied that application. 22-70 Supp. C.A. App. 2.

⁴ See generally Executive Office for Immigration Review, U.S. Dep’t of Justice, *Policy Memorandum 25-47: Case Priorities and Immigration Court Performance Measures 2* (Sept. 12, 2025), perma.cc/6cm8-vx9f (noting history of prioritizing “all cases involving individuals in detention or custody”).

G.M. appealed that denial to the Board, and that appeal remains pending. Pet. App. 9a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted on two questions: (1) whether there is a point at which an alien’s detention under 8 U.S.C. 1226(c), pending a decision on whether he is to be removed, becomes “unreasonably prolonged,” such that due process requires a bond hearing; and (2) if so, whether, in such a bond hearing, due process requires placing the burden on the government to justify the alien’s continued detention by clear and convincing evidence. Both questions are ones this Court considered but did not reach in *Jennings v. Rodriguez*, 583 U.S. 281 (2018), and the Court should take this opportunity to resolve them.

I. THIS COURT SHOULD REVIEW THE COURT OF APPEALS’ HOLDING THAT THERE IS A POINT AT WHICH SECTION 1226(c) DETENTION BECOMES “UNREASONABLY PROLONGED,” SUCH THAT DUE PROCESS REQUIRES A BOND HEARING

The decision below held that Section 1226(c) is unconstitutional as applied to aliens whose detention has become “unreasonably prolonged.” Pet. App. 5a; see *id.* at 15a-39a. This Court usually grants certiorari when a court of appeals has invalidated the application of a federal statute. And certiorari is particularly warranted here because the decision below conflicts with the decisions of other circuits on an issue that was the subject of supplemental briefing in *Jennings*. Moreover, the decision below is incorrect; among other things, it erroneously applies a procedural-due-process framework to analyze respondents’ substantive-due-process claims. Accordingly, this Court’s review is warranted.

A. Whether Due Process Requires Bond Hearings For Section 1226(c) Detainees Warrants This Court’s Review

1. This Court should grant review because the Second Circuit has held an Act of Congress unconstitutional. Judging the constitutionality of a federal statute “is the gravest and most delicate duty that this Court is called on to perform.” *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.). Accordingly, “when a lower court has invalidated a federal statute,” the Court’s “usual” approach is to grant certiorari. *Iancu v. Brunetti*, 588 U.S. 388, 392 (2019); see, e.g., *Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 10-11 (2025); *Kennedy v. Braidwood Mgmt., Inc.*, 606 U.S. 748, 758-759 (2025); *SEC v. Jarkesy*, 603 U.S. 109, 119-120 (2024); *United States v. Rahimi*, 602 U.S. 680, 689-690 (2024); *CFPB v. Community Fin. Servs. Ass’n of Am., Ltd.*, 601 U.S. 416, 424 (2024).

As-applied invalidations are no exception. This Court regularly grants review of decisions holding federal statutes invalid as applied. For example, in *DHS v. Thuraissigiam*, 591 U.S. 103 (2020), this Court reviewed a court of appeals’ invalidation of IIRIRA’s limitations on habeas review “as applied” to certain aliens. *Id.* at 107. In *Vidal v. Elster*, 602 U.S. 286 (2024), this Court reviewed a court of appeals’ invalidation of a federal statutory bar on trademark registration as applied to marks that criticize a governmental official or public figure. *Id.* at 291-292. And in *United States v. Hemani*, cert. granted, No. 24-1234 (Oct. 20, 2025), this Court will review a court of appeals’ as-applied invalidation of a federal statute that prohibits unlawful users of controlled substances from possessing firearms.

Section 1226(c) “mandates detention ‘pending a decision on whether the alien is to be removed from the

United States,’ and it expressly prohibits release from that detention except for narrow, witness-protection purposes.” *Jennings*, 583 U.S. at 304 (citation omitted). According to the Second Circuit, however, Section 1226(c) is unconstitutional as applied to aliens who have been detained for an “unreasonably prolonged” period; the decision below holds that the Constitution entitles such aliens to an opportunity for release that the statute prohibits. Pet. App. 5a. Because the decision below invalidates the application of a federal statute to an entire category of cases, this Court’s review is warranted.

The breadth of the Second Circuit’s invalidation of Section 1226(c) reinforces the need for this Court’s review. One of the respondents, Black, had been detained for only seven months when the district court granted habeas relief. Pet. App. 4a. Yet the Second Circuit concluded that even his detention had become “unreasonably prolonged,” *id.* at 5a—despite the fact that it exceeded by only one month the length of the Section 1226(c) detention that this Court upheld in *Demore v. Kim*, 538 U.S. 510, 531 (2003). Indeed, the Second Circuit acknowledged that, under its decision, “any immigration detention exceeding six months without a bond hearing raises serious due process concerns.” Pet. App. 29a. The decision below thus threatens to invalidate a broad swath of Section 1226(c)’s applications.

2. This Court often grants review of a lower court’s decision invalidating a federal statute even in the absence of a circuit conflict. See, *e.g.*, *Fuld*, 606 U.S. at 10-11; *Braidwood*, 606 U.S. at 758-759; *Barr v. American Ass’n of Political Consultants, Inc.*, 591 U.S. 610, 618 (2020) (*AAPC*) (plurality opinion). But here, the decision below forms part of a three-way circuit split—making certiorari particularly warranted.

In its decision below, the Second Circuit held that detention under Section 1226(c) violates the Due Process Clause when it becomes “unreasonably prolonged.” Pet. App. 5a. The Second Circuit further held that the three-factor balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), “supplies the proper framework” for determining when detention under Section 1226(c) has reached that point. Pet. App. 5a. Applying that framework here, the Second Circuit concluded that both Black’s detention of 7 months and G.M.’s detention of 21 months had become “unreasonably prolonged,” such that “due process entitled [them] to individualized bond hearings by an IJ.” *Id.* at 39a; see *id.* at 4a.

As many have recognized, the Second Circuit’s approach conflicts with the Eighth Circuit’s approach in *Banyee v. Garland*, 115 F.4th 928 (2024), reh’g en banc denied, 131 F.4th 823 (2025). See, e.g., *id.* at 932 n.3 (rejecting the Second Circuit’s approach); Pet. App. 149a (Menashi, J., dissenting from the denial of rehearing en banc) (observing that the decision below “entrenches a direct circuit split with the Eighth Circuit”); Pet. App. 169a (Chin and Carney, JJ., in support of the denial of rehearing en banc) (criticizing the Eighth Circuit for “fail[ing] to meaningfully address its split with [the Second Circuit] and others”). In *Banyee*, the Eighth Circuit held that “[d]ue process imposes no time limit on detention pending deportation.” 115 F.4th at 930. The Eighth Circuit thus rejected the application of a “multi-factor ‘reasonableness’ test,” such as the one articulated in *Mathews*, for determining when detention under Section 1226(c) has become unconstitutionally prolonged. *Id.* at 933; see *id.* at 932 n.3. Instead, it held that “the government can detain an alien for as long as deportation proceedings are still ‘pending.’” *Id.* at 933 (citation

omitted). The court then upheld the constitutionality of an alien’s “year-long” detention under Section 1226(c), *id.* at 931, finding “no indication that [his] ongoing proceedings [we]re a ruse ‘to incarcerate him for other reasons,’” *id.* at 934 (brackets and citation omitted); see *id.* at 933-934.

Both the Second Circuit’s and the Eighth Circuit’s approaches also conflict with that of the Third Circuit in *German Santos v. Warden, Pike County Correctional Facility*, 965 F.3d 203 (2020). See, e.g., *Banyee*, 115 F.4th at 932 n.3 (rejecting the Third Circuit’s approach). Like the Second Circuit (but not the Eighth), the Third Circuit has held that detention under Section 1226(c) violates the Due Process Clause when it becomes “unreasonable.” *German Santos*, 965 F.3d at 210. But unlike the Second Circuit, the Third Circuit does not recognize *Mathews* as the proper framework for determining when Section 1226(c) detention has reached that point. See *id.* at 210-211. Instead, the Third Circuit in *German Santos* adopted a four-factor “reasonableness” test for making that determination. *Id.* at 211. Under *German Santos*, those factors are: (1) “the duration of detention,” (2) “whether the detention is likely to continue,” (3) “the reasons for the delay,” and (4) “the alien’s conditions of confinement.” *Ibid.* Applying those factors in *German Santos*, the Third Circuit concluded that an alien’s detention “for more than two-and-a-half years” under Section 1226(c) had become “unreasonable,” such that due process entitled him to “a bond hearing to gauge whether he still need[ed] to be detained.” *Id.* at 213; see *id.* at 212-213.

In short, the Eighth Circuit disagrees with the Second and Third Circuits about whether a Section 1226(c) detainee has a due-process right to a bond hearing when

his detention becomes “unreasonable” (in the words of the Third Circuit) or “unreasonably prolonged” (in those of the Second Circuit). And the Second and Third Circuits disagree with each other about how to determine when Section 1226(c) detention has reached that point. This Court should grant review to resolve those disagreements among the circuits.

3. This Court should also take this opportunity to resolve the constitutional questions that it considered but did not reach in *Jennings*. In that case, the Ninth Circuit had construed Section 1226(c) “as imposing an implicit 6-month time limit” on an alien’s mandatory detention. *Jennings*, 583 U.S. at 292. It adopted that construction on the view that “prolonged detention without adequate procedural protections * * * would raise serious constitutional concerns.” *Id.* at 296 (citation omitted).

After granting certiorari and hearing argument, this Court ordered supplemental briefing on the constitutional issues underlying the Ninth Circuit’s statutory construction, including “[w]hether the Constitution requires that criminal or terrorist aliens who are subject to mandatory detention under Section 1226(c) must be afforded bond hearings, with the possibility of release, if detention lasts six months.” *Jennings v. Rodriguez*, 580 U.S. 1040, 1040 (2016). But this Court ultimately decided the case—and rejected the Ninth Circuit’s construction of Section 1226(c)—without reaching those constitutional issues. See *Jennings*, 583 U.S. at 312 (remanding for the Ninth Circuit to consider the “constitutional arguments” in “the first instance”).

The Second Circuit’s decision presents a clean vehicle for this Court to resolve those issues. Both respondents fall within the scope of Section 1226(c). See Pet. App. 60a-61a (“The parties do not dispute that [G.M.’s]

conviction for second degree assault is an ‘aggravated felony’ for purposes of the INA.”); *id.* at 92a (“[Black] is detained under § 1226(c) for having committed an aggravated felony in his violation of NYPL § 130.65(3), for sexual contact with a minor less than eleven years old.”). And the decision below—holding that each respondent’s detention under Section 1226(c) had become “unreasonably prolonged”—rests entirely on constitutional grounds. *Id.* at 5a. Moreover, although respondents are no longer in DHS custody, their cases are “not moot.” *Id.* at 3a. As the Second Circuit correctly recognized, each case continues to present a live Article III controversy because the questions presented bear on whether and under what circumstances respondents could be redetained. See *id.* at 4a n.1 (holding that G.M.’s case “continues to present a live controversy under Article III”); 20-3224 C.A. Doc. 109 (Nov. 17, 2021) (denying Black’s motion to dismiss the government’s appeal on mootness grounds). These cases thus squarely present the constitutional issues that the Court in *Jennings* did not reach, which are now the subject of a circuit split.

B. The Court Of Appeals Erred In Holding That Due Process Requires Bond Hearings For Section 1226(c) Detainees Like Respondents

The Second Circuit’s decision is also incorrect. In analyzing respondents’ claims, the decision below applied the procedural-due-process framework set forth in *Mathews*. Pet. App. 5a, 20a-39a. But respondents’ claims are substantive, not procedural, due-process claims. And when properly analyzed in terms of substantive due process, those claims plainly lack merit.

1. Respondents' claims are substantive, not procedural, due-process claims

The Constitution prohibits the federal government and States from “depriv[ing]” a “person” of “life, liberty, or property, without due process of law.” U.S. Const. Amend. V; see U.S. Const. Amend. XIV, § 1. This Court has recognized two types of due-process claims. See *Department of State v. Muñoz*, 602 U.S. 899, 910 (2024). A *procedural*-due-process claim takes as given the substantive determinations that would justify a deprivation of life, liberty, or property, but challenges the “adequacy of the[] procedures” for making those determinations. *Mathews*, 424 U.S. at 335. In contrast, a *substantive*-due-process claim challenges the substance of the determinations themselves, arguing that they are inadequate to justify the deprivation “*at all*.” *Reno v. Flores*, 507 U.S. 292, 302 (1993).

Section 1226(c) states that the government “shall take into custody any alien” who falls within one of the provision’s enumerated categories of criminal aliens. 8 U.S.C. 1226(c)(1). Section 1226(c) permits release only “for narrow, witness-protection purposes.” *Jennings*, 583 U.S. at 304; see 8 U.S.C. 1226(c)(4). The statute thus “imposes an affirmative *prohibition* on releasing detained aliens under any other conditions.” *Jennings*, 583 U.S. at 304.

Respondents do not challenge the adequacy of the procedures for determining whether an alien falls within one of Section 1226(c)’s enumerated categories.⁵

⁵ As explained above, an alien may request a *Joseph* hearing to challenge the determination that he is subject to mandatory detention under Section 1226(c). See p. 7, *supra*. Black unsuccessfully challenged his mandatory detention at a *Joseph* hearing. See *ibid*. G.M. did not request such a hearing. See p. 9, *supra*.

Indeed, neither Black nor G.M. contested in his habeas petition that he is a criminal alien within the scope of Section 1226(c). See Pet. App. 60a-61a, 92a, 190a, 240a. Instead, respondents contend that a determination that they are criminal aliens is inadequate to justify the deprivation at issue—*i.e.*, their purportedly “prolonged” detention under Section 1226(c). *Id.* at 5a. In their view, such a deprivation can be justified only by a determination different from the one that Congress specified—a determination that they pose a flight risk or danger to the community. *Id.* at 208a, 225a, 275a.

Respondents’ claims are thus substantive, not procedural, due-process claims. To be sure, respondents contend that due process requires additional *procedures* in the form of a bond hearing. Pet. App. 225a, 275a. But a bond hearing is merely a vehicle for making the *substantive* determination about flight risk or dangerousness that respondents believe is necessary to justify their “prolonged” detention. And because Section 1226(c) does not require such a determination, respondents’ claim is a substantive due-process challenge, not a procedural one.

This Court’s decision in *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), illustrates the point. The statute in that case required sex offenders to register with the State so that their information could be published on a sex-offender registry. *Id.* at 4-5. John Doe, who had previously been convicted of a sex offense, claimed that the statute violated his procedural-due-process rights by requiring him to register without a “hearing to determine whether” he was “currently dangerous.” *Id.* at 4 (citation omitted); see *id.* at 8. The Court rejected Doe’s claim. The Court held that “[p]lain-tiffs who assert a right to a hearing under the Due Process

Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme.” *Id.* at 8; see *id.* at 4 (“[D]ue process does not require the opportunity to prove a fact that is not material to the State’s statutory scheme”). But what Doe sought to establish—that he was “not currently dangerous”—was “of no consequence” under the statute, which required him to register based on his prior conviction alone. *Id.* at 7. The Court concluded that because “any hearing on current dangerousness” would be “a bootless exercise” under the statute’s “*substantive* rule of law,” Doe’s *procedural*-due-process claim failed: Any claim that he was entitled to such a hearing “‘must ultimately be analyzed’ in terms of substantive, not procedural, due process.” *Id.* at 7-8 (citation omitted).

Accordingly, respondents have no procedural-due-process right to a bond hearing on whether they are a flight risk or danger to the community. Individualized findings about flight risk and danger are irrelevant under Section 1226(c)(1)(B), which subjects respondents to mandatory detention based on their aggravated-felony convictions alone. See pp. 7, 9, *supra*. As in *Doe*, any claim that respondents are entitled to a bond hearing “‘must ultimately be analyzed’ in terms of substantive, not procedural, due process.” 538 U.S. at 8 (citation omitted); see *Flores*, 507 U.S. at 308 (holding that a challenge to a regulation on the ground that it failed to require a determination of a detainee’s “interests” was “just [a] ‘substantive due process’ argument recast in ‘procedural due process’ terms”); *Michael H. v. Gerald D.*, 491 U.S. 110, 119, 121 (1989) (plurality opinion) (treating a request for an “evidentiary hearing” on an issue that the statutory scheme deemed “*irrelevant*” as a “substantive due process” claim).

The Second Circuit’s reliance on *Mathews* was therefore misplaced. Pet. App. 24a-26a. *Mathews* articulates a three-part balancing test for analyzing certain “procedural due process” claims. *Nelson v. Colorado*, 581 U.S. 128, 134 (2017). But that test has no application in the realm of substantive due process. After all, *Mathews* takes the “nature of the relevant inquiry” as given, 424 U.S. at 343, and asks only whether the “procedures” for conducting that inquiry are adequate, *id.* at 335. Here, in contrast, respondents contend that the Constitution requires a different inquiry altogether. Because that is a substantive, rather than procedural, due-process challenge to the statute, the Second Circuit erred in treating *Mathews* as the applicable test.⁶

2. Respondents have no substantive-due-process right to a bond hearing

When analyzed in terms of substantive due process, respondents’ claims fail. Respondents’ detention without a bond hearing during the pendency of their removal proceedings does not implicate any fundamental rights. See *Demore*, 538 U.S. at 523 n.7 (“prior to 1907 there was no provision permitting bail for *any* aliens during the pendency of their deportation proceedings”); cf. *Muñoz*, 602 U.S. at 909-916. Accordingly, rational-basis review is the appropriate standard for analyzing respondents’ substantive-due-process claims. *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). Under that standard, detention under Section 1226(c) is constitutionally permissible as long as it is “rationally related to legitimate government interests.” *Ibid.*

⁶ The Second Circuit’s analysis of the *Mathews* factors—which underlay its decisions on both questions presented, Pet. App. 40a—also fails on its own terms. See pp. 28-30, *infra*.

In *Demore*, this Court considered a “substantive due process” challenge to detention under Section 1226(c). 538 U.S. at 515. Like respondents here, Hyung Joon Kim “argued that his detention under § 1226(c) violated due process because the [government] had made no determination that he posed either a danger to society or a flight risk.” *Id.* at 514. The Court rejected that argument and upheld the application of Section 1226(c) to “persons such as [Kim].” *Id.* at 513. The Court emphasized that Section 1226(c) “governs detention of deportable criminal aliens *pending their removal proceedings*.” *Id.* at 527-528. “Such detention,” the Court explained, “necessarily serves the purpose of preventing deportable criminal aliens from fleeing prior to or during their removal proceedings, thus increasing the chance that, if ordered removed, the aliens will be successfully removed.” *Id.* at 528. Detention also serves the purpose of preventing “deportable criminal aliens” from “continu[ing] to engage in crime.” *Id.* at 513.

At the same time, the Court suggested that an alien’s detention would “no longer bear[] a reasonable relation to th[ose] purpose[s]” if his removal were “no longer practically attainable.” *Demore*, 538 U.S. at 527 (quoting *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001)). While an alien’s removal proceedings are ongoing, that would be true only in the extraordinary circumstance in which the proceedings ceased to be a means of effectuating the alien’s removal and became a “ruse” to keep the alien in detention. *Banyee*, 115 F.4th at 934. *Demore* thus left open the possibility that a Section 1226(c) detainee could bring an as-applied challenge to his detention on the ground that his removal proceedings had become a “sham.” Pet. App. 141a (Menashi, J., dissenting from the denial of rehearing en banc).

Here, respondents have not alleged, nor is there any evidence to suggest, that their ongoing removal proceedings are a sham. See Pet. App. 141a, 144a (Menashi, J., dissenting from the denial of rehearing en banc). In both of their cases, an IJ has entered an order of removal, and the proceedings have continued only because respondents have filed appeals with the Board. See pp. 9, 13-14, *supra*. Removal thus remains a practically attainable goal, and while the proceedings remain pending, each respondent’s detention under Section 1226(c) bears a reasonable relation to the legitimate purposes that this Court identified in *Demore*. Section 1226(c) is therefore constitutional as applied to respondents.

II. THIS COURT SHOULD REVIEW THE COURT OF APPEALS’ HOLDING THAT DUE PROCESS REQUIRES PLACING THE BURDEN ON THE GOVERNMENT TO JUSTIFY CONTINUED DETENTION BY A HEIGHTENED STANDARD

The court of appeals further held that, in bond hearings for Section 1226(c) detainees, due process requires placing the burden on the government to justify continued detention by clear and convincing evidence. Pet. App. 39a-45a. That holding is wrong, and it also warrants this Court’s review, alongside whether due process requires a bond hearing in the first place.

A. The Type Of Bond Hearing Due Process Requires Warrants This Court’s Review

The second question presented is a question of “remedy”—*i.e.*, of the type of bond hearing an alien should be afforded if due process entitles him to one. Pet. App. 153a (Chin and Carney, JJ., in support of the denial of rehearing en banc). This Court regularly grants review of remedial questions alongside questions asking

whether there is a constitutional violation in the first place. See, *e.g.*, *Collins v. Yellen*, 594 U.S. 220, 250-260 (2021) (reviewing both constitutional and remedial issues); *AAPC*, 591 U.S. at 618-636 (plurality opinion) (reviewing both constitutional and severability issues). The Court should likewise do so here.

Indeed, the Court in *Jennings* considered the two issues together, ordering supplemental briefing on both (1) whether the Constitution requires that Section 1226(c) detainees be afforded bond hearings if their detention lasts six months, and (2) if the Constitution does so require, whether it further requires that, in such bond hearings, the burden be placed on the government to “demonstrate[] by clear and convincing evidence that the alien is a flight risk or a danger to the community.” 580 U.S. at 1040. *Jennings* ultimately did not resolve either issue, and there is no reason not to consider the issues together again here.

Moreover, although the Third Circuit has agreed with the Second Circuit that the government must bear the burden of justifying the alien’s detention by clear and convincing evidence, see *German Santos*, 965 F.3d at 210-214, other circuits have not, in cases involving bond hearings for aliens detained under Section 1226(a). See Pet. App. 112a-113a (Nardini, J., dissenting from the denial of rehearing en banc). The Fourth and the Ninth Circuits, for example, have held that due process allows placing the burden on a Section 1226(a) detainee to prove that he poses neither a flight risk nor a danger to the community. See *Miranda v. Garland*, 34 F.4th 338, 358-366 (4th Cir. 2022); *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1210-1212 (9th Cir. 2022). In contrast, the First Circuit has held that due process requires the government to prove that the Section 1226(a) detainee

is a flight risk or a danger, though under different standards of proof: “a preponderance of the evidence” for flight risk, and “clear and convincing evidence” for dangerousness. *Hernandez-Lara v. Lyons*, 10 F.4th 19, 41 (2021). As Judge Nardini noted in his dissent from the denial of rehearing en banc, those other circuits’ approaches are hard to square with the decision below. See Pet. App. 123a-126a.

B. The Court Of Appeals Erred In Requiring The Government To Justify A Criminal Alien’s Continued Detention By Clear And Convincing Evidence

The Second Circuit’s holding that, in a bond hearing for a Section 1226(c) detainee, due process requires the government to justify continued detention by clear and convincing evidence is also mistaken. Congress enacted Section 1226(c) out of “justifiabl[e] concern[] that deportable criminal aliens who are not detained” will “continue to engage in crime and fail to appear for removal hearings in large numbers.” *Demore*, 538 U.S. at 513. The burden should therefore be on the alien to show by a preponderance of the evidence that Congress’s concerns about flight risk and dangerousness do not apply to him. See Pet. App. 118a (Nardini, J., dissenting from the denial of rehearing en banc). Nothing in the Due Process Clause requires shifting the burden to the government and requiring it to demonstrate flight risk or dangerousness by a heightened standard.

The Second Circuit’s contrary decision is deeply flawed. The court characterized the alien’s interest as “the most significant liberty interest there is.” Pet. App. 31a (citation omitted); see *id.* at 40a. But the grounds on which an alien is subject to Section 1226(c) detention are also grounds for removal from the United States. 8 U.S.C. 1226(c)(1)(A)-(E). And as Judge Menashi ex-

plained in his dissent from the denial of rehearing en banc, “a removable alien does not have a ‘significant liberty interest’ to be released into the United States while removal proceedings are pending.” Pet. App. 131a; see *Demore*, 538 U.S. at 522 (“Congress may make rules as to aliens that would be unacceptable if applied to citizens.”).

The Second Circuit also suggested that placing the burden of proof on the criminal alien would “present[] too great a risk of an erroneous deprivation of liberty.” Pet. App. 42a-43a. But the party with the best access to information regarding the alien’s flight risk and dangerousness is the alien himself. See *Miranda*, 34 F.4th at 362 (explaining that aliens should “know more than the government” about “any mitigating evidence related to [their criminal] history,” “family or employment information,” and “what the alien has been doing while in the United States”). And requiring the government to bear the burden of proof—especially by clear and convincing evidence—would have the perverse effect of rewarding the alien for not sharing information.

Finally, the court of appeals reasoned that its decision would “do nothing to undercut” the government’s interests because, “[a]t any ordered bond hearing, the IJ would assess on an individualized basis whether the noncitizen presents a flight risk or a danger.” Pet. App. 36a; see *id.* at 40a. But Congress enacted Section 1226(c) “precisely out of concern that such individualized hearings could not be trusted to reveal which ‘deportable criminal aliens who are not detained’ might ‘continue to engage in crime or fail to appear for their removal proceedings.’” *Nielsen v. Preap*, 586 U.S. 392, 412 (2019) (opinion of Alito, J.) (brackets omitted) (quoting *Demore*, 538 U.S. at 513). The Second Circuit made no attempt to reconcile its decision with that concern. And its con-

clusion that the government must justify a criminal alien's detention by clear and convincing evidence has no basis in the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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